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2010

# Layne Jex v. Precision Excavating and/or Owners Insurance Company, and Utah Labor Commission : Brief of Appellee

Utah Court of Appeals

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### Recommended Citation

Brief of Appellee, *Layne Jex v. Precision Excavating and/or Owners Insurance Company, and Utah Labor Commission*, No. 20100674 (Utah Court of Appeals, 2010).

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**IN THE UTAH COURT OF APPEALS**

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LAYNE JEX,

Petitioner/Appellant,

vs.

PRECISION EXCAVATING,  
and/or OWNERS INSURANCE  
COMPANY, and UTAH LABOR  
COMMISSION,

Respondents/Appellees.

:

Court of Appeals

:

Case No.: **2010-0674**

:

Priority 7

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Labor Commission No.: 08-1030

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**BRIEF OF APPELLEE**  
**PRECISION EXCAVATING and OWNERS INSURANCE COMPANY**

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Appeal from the Utah Labor Commission

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FILED  
UTAH APPELLATE COURTS  
MAR 09 2011

**RESPONDENTS' RESPECTFULLY REQUEST ORAL ARGUMENT**  
**AND THAT THIS CASE BE REPORTED.**

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Appeal from the Utah Labor Commission

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**RESPONDENTS' RESPECTFULLY REQUEST ORAL ARGUMENT  
AND THAT THIS CASE BE REPORTED.**

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## **JURISDICTION OF THE COURT OF APPEALS**

This Petition for Review is from a final order of the Labor Commission of Utah dated July 29, 2010. This Court has jurisdiction over this appeal pursuant to Utah Code Annotated §§ 34A-2-801(8)(a), 63G-4-403, and 78-2a-3(2)(a).

## **ISSUES PRESENTED AND STANDARDS OF REVIEW**

Issue: Whether Mr. Jex's motor vehicle accident, "arose out of and in the course of his employment" under section 34A-2-401, Utah Code, entitling him to receive worker's compensation benefits.

### **Standard of Review**

The Court of Appeals should review the empirical facts for clear error. The Court of Appeals will disturb the Labor Commission's findings of fact only if they are clearly erroneous. The Court of Appeals must review the legal determinations of the Labor Commission under a correction-of-error standard, giving the Commission no deference as appellate courts have, "the power and duty to say what the law is and to ensure that it is uniform throughout the jurisdiction." Salt Lake City Corp. v. Labor Comm'n, 2007 UT 4, P13 (Utah 2007) (quoting State v. Pena, 869 P.2d 932, 936 (Utah 1994)). The issue before the Court is a

mixed question of law and fact, one that calls upon the Court to review the application of law to fact.<sup>1</sup>

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<sup>1</sup> Respondents challenge the standard of review articulated by Petitioner. He cites a correction of error standard of review. The correct standard of review is articulated above.

### **DETERMINATIVE LAW**

The determinative law is Utah Code Ann. § 34A-2-401 (Utah “Workers Compensation Act”), the provision authorizing workers’ compensation benefits for industrial accidents. This section reads as follows:

An employee described in Section 34A-2-104 who is injured . . . by accident arising out of and in the course of the employee's employment, wherever such injury occurred, if the accident was not purposely self-inflicted, shall be paid . . . compensation for loss sustained on account of the injury . . . such amount for medical, nurse, and hospital services . . . [and] medicines . . . .

Utah Code Ann. § 34A-2-401 (2011).

Utah Courts have repeatedly held that an employee’s injury does not “arise out of” and occur “in the course of” employment if the going and coming rule is found to apply. See Drake v. Industrial Comm’n of Utah, 939 P.2d 177 (Utah 1997).



## **STATEMENT OF THE CASE**

### **Nature of the Case**

This case presents the question of whether a worker is entitled to worker's compensation benefits when that worker is car-pooling with another co-worker and is injured in his personal vehicle while traveling home from work from a construction site when, although having personal tools in his vehicle which he used on occasion at his own leisure at the work site, is not under the control or direction of the employer at the time of accident; chooses his own route and manner of travel; is not being compensated wages or travel expenses while traveling; is not on any company errand; is not performing any job duty for any benefit of the employer while traveling and, is not performing any work duties at the time of the accident.

### **Course of the Proceedings**

1. On August 20, 2008, Mr. Jex filed an Application for Hearing seeking worker's compensation benefits from Respondents arising from a motor vehicle accident on July 22, 2008, while traveling on 1-15 on his way home from work. (R., 1).
2. On October 6, 2008, Respondents filed an Answer denying worker's compensation liability on the grounds that Mr. Jex's accident did

not, “arise out of and in the course of employment” with Respondents. (R., 13-18).

3. A hearing was held on February 26, 2009, before administrative law judge Cheryl Luke. At the hearing, the parties presented evidence including the testimony of Layne Jex and Trent Holden, the latter who testified for Respondents. (R., 74).
4. On May 28, 2009, the ALJ issued Findings of Fact, Conclusions of Law and Order. In that Order, the ALJ determined that Mr. Jex's accident did not, “arise out of and in the course of employment” with Respondents based upon the application of the going and coming rule. (R., 31-38).
5. On June 26, 2009, Mr. Jex filed a Motion for Review challenging the ALJ's Order. (R., 39-50).
6. On July 16, 2009, Respondents filed a Response to Motion for Review. (R., 52-68).
7. On July 29, 2010, the Labor Commission issued its Order Affirming ALJ's Decision. (R., 70-72).
8. On August 28, 2010, Mr. Jex filed a Petition for Review. Petitioner later filed a Docketing Statement on September 14, 2010.

### **Statement of Facts**

1. On June 2, 2008, Mr. Jex began working for Respondent, Precision Excavating. He worked as a machine operator. (R., 74 at 17, 49).
2. On August 20, 2008, Mr. Jex filed an Application for Hearing and claimed an entitlement to workers' compensation benefits arising from a motor vehicle accident, which occurred while Mr. Jex was operating his own vehicle while traveling home with a co-worker from a construction site on July 22, 2008. (R., 1-9).
3. On February 26, 2009, a hearing was conducted on Mr. Jex's claims. Mr. Jex's supervisor, Trent Holden, testified at the hearing that Respondent Precision Excavating is a St. George based company. He testified that there was a decrease in construction work available in the St. George area and that the company was going to lay off employees. He noted that the company was able to find work in the Cedar City, Utah area in lieu of laying off workers. Mr. Holden further testified that he told employees that there was a company truck available on a first come basis to transport them to the work site. He indicated that those who chose to operate their own vehicles would not be compensated for travel time or gas to and from the Cedar City job site. (R., 74 at 106).

4. Mr. Jex testified that he occasionally drove his own truck to the job site and that sometimes he gave rides to co-workers. Mr. Jex admitted that he preferred to drive his own vehicle since some individuals smoked when riding to or from work in the company vehicle. He also confirmed that he was not paid for travel time or mileage when traveling to or from the job site from St. George. Mr. Jex also confirmed that he was not paid a gas stipend for his travel to or from the job site, or when he made a total of two errands on company time. (R., 74 at 50-54, 58-59, 63).
5. On the date of the accident, Mr. Jex's work shift had ended. Mr. Jex then left the construction job site located in Cedar City and was traveling in his own truck on I-15 on his way home when he was involved in a motor vehicle accident. (R., 74 at 59).
6. Trent Holden testified at hearing that at the end of the day on July 22, 2008, he gave Mr. Jex instructions for the next day and told Mr. Jex that he could leave. Mr. Holden indicated that he was working late. Mr. Jex then drove down the hill away from the immediate work area and noticed that a Mustang driven by a fellow co-worker, James Irvin, was not on the work site. Mr. Jex assumed that Mr. Irvin may need a ride home since Mr. Holden was working

late. Mr. Jex drove back to discuss the matter with Mr. Holden and inquired if he should give Mr. Irvin a ride home. Mr. Holden said: "Yeah go ask James, if he wants to go now and give him a ride."

Mr. Holden testified that Mr. Irvin could have remained on the job site and work overtime and ride home in the company truck.

However, from the testimony presented, it was not made clear by Mr. Jex to Mr. Irvin that he had the option to stay on the job site and to continue working, if he chose to do so. (R., 74 at 94-96).

7. Mr. Holden testified that he had never required Mr. Jex to give Mr. Irvin a ride home. He simply agreed, at Mr. Jex's suggestion, that if Petitioner and Mr. Irwin wanted to ride home together, they were free to do so. (R., 74 at 94-96).
8. Evidence was presented at hearing showing that Mr. Irvin left the job site with Mr. Jex in Mr. Jex's personal vehicle. They made no stops on the way home and, after 40 minutes into the drive, a tire came apart on Mr. Jex's vehicle, and the vehicle rolled. (R., 74 at 29-30).
9. At the hearing, Mr. Jex brought an exhibit of tools which he carried in his personal truck. He claimed to have occasionally used some of these tools in his work at the Cedar City job site. These tools

included a tape measure, pipe wrench, crescent wrench, sledge hammer, and a level. (R., 74 at 32-34).

10. On cross examination, Petitioner admitted that it was at his own convenience to have the tools available for his use at the Cedar City job site. He acknowledged that his ownership of these tools was not a required condition of his employment with Respondent, Precision Excavating. In fact, Mr. Jex admitted that Respondent, Precision Excavating, had similar tools available for him to use at the job site, and that the employer did not require him to bring any tools for use at the job site. Petitioner also admitted that the tools were used by him for his own personal use, and were not purchased or maintained by the employer. (R., 74 at 66-79).
11. Mr. Holden similarly testified that all of the tools needed for the Cedar City project were provided for by the employer, and Mr. Jex was not required to bring his own tools to the job site. (R., 74 at 97-105).
12. Mr. Jex also presented testimony that on two occasions, he used his personal truck to run errands for his employer on the Cedar City job. Once, Mr. Jex traveled to Napa Auto Parts and later to Wheeler Machinery to get parts needed for the project. He

admitted that he was not paid for gas consumption at the time he ran these two errands, but that he was on the payroll clock.

However, neither of these errands occurred on the date of the accident. (R., 74 at 44-46).

13. Evidence was also presented by both Mr. Jex and Mr. Holden that the employer did not instruct Mr. Jex how to drive or to maintain his personal vehicle; which route to travel to and from the job site; that Mr. Jex was not under any employer control or supervision at the time of the accident; and that Mr. Jex was on a public freeway when the accident occurred. (R., 74 at 57-58).
14. On May 28, 2009 ALJ Cheryl Luke issued Findings of Fact, Conclusions of Law and Order. In that Order, the ALJ determined that Mr. Jex's accident did not "arise out of and in the course of employment" with Respondent based upon the application of the going and coming rule. (R., 31-38). The ALJ opined that Jex's accident fell within the traditional going and coming rule situation.
15. On June 26, 2009, Mr. Jex filed a Motion for Review challenging the ALJ's Order. (R., 39-50). Mr. Jex argued that an exception to the going and coming rule applied since he was using his personal

vehicle as an “instrumentality” of the employer's business on the date of injury and did so regularly. (R., 39-50).

16. On July 16, 2009, Respondents filed a Response to Motion for Review. (R., 52-68). Respondents argued that the ALJ properly determined that Mr. Jex's accident fell within the traditional going and coming rule and was, therefore, not compensable under the Utah Worker's Compensation Act. Respondents argued that Mr. Jex's vehicle was not an instrumentality of Precision's business and in fact, Mr. Jex was not performing any job related service while traveling home from work; was not on any company errand or special mission at the time of accident; was not being compensated for his travel time between the work site and home; the risk associated with travel was one common to the general public; and Mr. Jex was not under the control or supervisor of the employer at the time of the accident. (R., 52-68).
17. On July 29, 2010, the Commission issued its Order Affirming ALJ's Decision. (R., 70-71). The Commission agreed with Respondent that Mr. Jex's accident did not arise out of and in the course of employment. The Commission determined that Mr. Jex's accident was subject to the going and coming rule and was not



compensable. The Commission rejected Mr. Jex's arguments that any of the exceptions to the going and coming rule applied in this case.

18. On August 28, 2010, Mr. Jex filed a Petition for Review. Mr. Jex later filed a Docketing Statement on September 14, 2010.

## **SUMMARY OF THE ARGUMENT**

The Commission's Order should be affirmed. The going and coming rule squarely applies to the facts of this case. Contrary to Mr. Jex's assertion, no exception to this rule applies.

The employer did not require Mr. Jex to perform any job-related service or use his personal vehicle as a business instrumentality while traveling to or from work. Mr. Jex was not on a company related "special errand" or "special mission" at the time of the accident.<sup>2</sup> Mr. Jex was not compensated for his time spent traveling between his home and the job site, and he was not paid a gas stipend. The employer did not regulate how Mr. Jex maintained or drove his own vehicle. The accident did not occur on the employer's premises, nor did Mr. Jex's duties require him to be at the place where the accident occurred. The risk that caused the accident was one common to the traveling public (a defective tire on Jex's personal vehicle which Mr. Jex personally maintained) and was not created by any duties connected with Mr. Jex's employment. Mr. Jex was not under the control or supervision of his employer at the time of the accident. He had chosen his own route each day, and had done so at

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<sup>2</sup> The transportation of a co-employee home was not mandated by the employer as a job duty. Moreover, Mr. Jex was not compensated for this travel. Hence, this activity does not qualify as a special errand or mission.

the time of the accident. It was not a benefit to the employer for Mr. Jex to ride home from the job site with a co-worker. Respondent, Precision Excavating did not require Mr. Jex to take home a fellow co-worker on the date of the accident, nor did the employer mandate that Mr. Jex use his own vehicle for transportation to and from the job site. Mr. Jex could have car-pooled with other co-workers, but he voluntarily chose not to do so.

The Commission was also correct to note that finding of compensability under the present facts of this case makes little sense and would essentially eviscerate the going and coming rule. Simply because a worker may carry with him a tool that could be used for work (i.e., a favorite business pen or other article), or in this case a few miscellaneous tools similarly used by many individuals in non-employment settings, or that the injured worker elects to ride to or from work with a fellow co-worker, does not unilaterally overcome the general going and coming rule.

Moreover, contrary to Mr. Jex's argument, it is Mr. Jex's burden to show, by a preponderance of evidence, that his case falls within the exception of the going and coming rule. It is not Respondent's burden to prove otherwise. Since Mr. Jex has failed to do so, and has failed to

show any reversible error, this Court should affirm the Commission's Order, deny Mr. Jex's claim for workers' compensation benefits, and dismiss his Application for Hearing with prejudice.

## **ARGUMENT**

### **THE COMMISSION PROPERLY RULED THAT COMPENSABILITY FOR THIS ACCIDENT IS BARRED BY THE GOING AND COMING RULE**

Mr. Jex challenges the Commission's Order Affirming ALJ's Decision. He argues that the Commission, like the ALJ, improperly denied his claims for worker compensation benefits since his accident is subject to exception from the going- and- coming rule. He argues that his personal vehicle was an instrumentality of the employer's business and, therefore, is an exception to the going and coming rule. Respondents disagree that any exception to the going and coming rule applies and submit that both the ALJ and the Commission properly evaluated this case and denied workers' compensation benefits to Mr. Jex under the well-established going-and- coming rule.

In Utah, to be eligible for workers' compensation benefits, an employee's injury must, "arise out of" and be sustained "in the course of employment". Utah Code Ann. § 34A-2-401. As a general rule in Utah, an employee's injury does not arise out of and occur in the course of employment if the injury is sustained while going to or coming from work

since these injuries are outside the time, space, and activity boundaries of work. See Drake v. Industrial Comm'n of Utah, 939 P.2d 177 (Utah 1997); VanLeeuwen v. Indus. Comm'n, 901 P.2d 281, 284 (Utah Ct. App. 1995). The coming-and-going rule arose because, "in most instances, such an injury is suffered as a consequence of the risks and hazards to which all members of the traveling public are subject rather than risks and hazards having to do with and originating in the work or business of the employer." Drake, 939 P.2d at 182 (quoting 82 Am. Jur. 2d Workers' Compensation § 296 (1992)).

In support of the "going and coming" rule, the Utah Supreme Court has reasoned that:

The major premise of the "going and coming" rule is that it is unfair to impose unlimited liability on an employer for conduct of its employees over which it has no control and from which it derives no benefit. Therefore, the major focus in determining whether or not the general rule should apply in a given case is on the benefit the employer receives and his control over the conduct.

Cross v. Board of Review, 824 P.2d 1202 (Utah Ct. App. 1992).

Professor Larson indicates that this general rule typically applies to employees having fixed hours of employment and place of work, known as "inside employees". "Outside employees" are characterized as employees that do not have a definite time and space boundary on their

employment. See Professor Larson treatise on worker's compensation at 13.01. Utah's courts have explained that easier cases involve inside employees. However, in more difficult cases, when the journey is relatively regular, whether every day, or at frequent intervals, the case begins **with a strong presumption that an employee's going-and-coming trip is expected to be no different than any other employee with reasonably regular hours and place of work.** See Drake, 939 P.2d at 183. (emphasis added).

In this case, the ALJ found that the motor vehicle accident in which Mr. Jex was involved, did not arise out of and in the course of Mr. Jex's employment due to the application of the going and coming rule. The ALJ explains her rationale in detail as follows:

In this case the petitioner argues that the transportation of co-workers both to and from the job site, the carrying and use of personal tools at the job site and the two time use of his vehicle to run a company errand are sufficient to sustain a finding of compensability.

Careful analysis of the facts in this case even when liberally construed in favor of the petitioner demonstrates otherwise. It was clear when the job was offered that it was the employee's responsibility to get to and from work (the traditional going and coming). When there was not work in St. George the employees were given an option of working at the Cedar City job site. The company would offer to shuttle over workers in the one truck that was assigned to the job site supervisor. The shuttle was offered on a first come basis and employees were not going to be paid for travel time or

expenses. In VanLeeuwen v Industrial Commission, 901 P.2d 281,284 (Utah App. 1995) we find that the general rule of non-compensability has an exception in situations where the employer provides transportation primarily for the employer's own benefit and exercises control over the use of that transportation. Under Utah law the major focus in determining whether or not the general rule should apply in a given case is on the benefit the employer receives and his control over the conduct of the employee. In this case Mr. Jex made a choice to drive his own vehicle for his own reasons including not being around smokers. The employer did not exercise any control over what days Mr. Jex drove, what vehicle he used, what routes he took to and from work. The loose cooperation between Mr. Jex in offering rides to other co-workers was not mandated by the employer. On the date of the accident Mr. Jex **offered** the ride to his co-worker and his communication with Mr. Holden is best described as informational communication, not employer instructions. In some cases getting a crew or other workers **to** the job might be of benefit to the employer. The trip in question only benefitted Mr. James and Mr. Jex who wanted to travel home from work like any other employee. There is no indication that had Mr. Jex not offered a ride to Mr. James that Mr. Holden and Precision Excavation's work would have been in anyway hindered as Mr. Holden was ready and able to give Mr. James a ride home. Indeed Mr. Holden testified that he told Mr. Jex to see **if** Mr. James wanted to leave or continue working. Mr. Jex botched the message and didn't communicate it in a way that gave Mr. James the option of working late which may have benefitted the employer.

Can Mr. Jex make his car an instrumentality of employment unilaterally? Clearly Mr. Jex used some of his own tools at the job and carried them in his truck. The convincing evidence is that this was not a job requirement, and was not necessary (he worked without problem on the days he rode with Mr. Holden and did not have access to the tools). The going and coming rule would be eviscerated if an employee could choose to bring something to work) a favorite pen for example (and unilaterally overcome the rule.

The third exception that is suggested by petitioner is that he was running a special errand for the company. They point to the trips to NAPA auto parts and Wheeler Machinery and then try to argue that giving James a ride home is similar. The NAPA and Wheeler errands were on company time during the work day and certainly if this accident had occurred while coming and going to get parts on those errands we would not be debating compensability. The accident in fact occurred off the clock on the employee's way home. This is the traditional coming and going situation and compensability is not proven.

The major premise of the "going and coming" rule is that it is unfair to impose unlimited liability on an employer for conduct of its employees over which it has no control and from which it derives no benefit Cross v Brd. of Review Indus. Comm'n, 824 P.2d 1202 (Ut. Ct App).

In this case the petitioner has not proven that he was any different then any other employee driving to and from a work place and ride-sharing with co-workers as a mutual convenience. Mr. Jex carried some personal tools that he could and did use at the job site but he was not required to do so and the company provided all necessary tools at the job site. Lastly Mr. Jex was on his way home and not under the control, direction or of benefit to his employer at the time of the accident. There has been no proof that supports a finding in the petitioner's favor under any exception to the going and coming rule.

I find that the petitioner has failed to meet his burden of proof that the accident and injuries suffered in the motor vehicle accident on July 22, 2008 arose out of and in the course of his employment.

(R., 31-38).

The Commission agreed with the ALJ and found that while Mr. Jex's truck twice served to benefit Respondent, Precision Excavating's business, in order to be exempt from the going and coming rule, Mr. Jex



must show that his truck served as an instrumentality to benefit Respondent, Precision Excavating's business at the time of the accident. The Commission further explained, that at the time of the accident, Mr. Jex was ridesharing with a co-worker out of convenience, not because Respondent, Precision Excavating mandated he do so. The Commission further explained that the employer did not pay Mr. Jex for his travel costs or provide any transportation to him at the time of the accident. Accordingly, the Commission found no control by the employer or benefit to the employer sufficient to exempt Mr. Jex from the traditional going and coming rule standard.

Respondents submit that the ALJ and Commission's findings and application of the law in this case should be affirmed by this Court.

**A. The ALJ and Commission Correctly Determined that Mr. Jex's Truck Was Not An Instrumentality of Business.**

Mr. Jex argues that an exception to the going and coming rule applies since he was using his personal vehicle as an, "instrumentality of business" for the employer at the time of the motor vehicle accident. He cites to a variety of cases in an attempt to support this position. Respondents disagree with Mr. Jex's argument and assert that the ALJ / Commission's finding that Mr. Jex's accident, occurring in his personal

vehicle on his way home from work, is barred by the going and coming rule.<sup>3</sup>

Mr. Jex relies on VanLeeuwen v. Industrial Comm'n, 901 P.2d 281 (Utah Ct. App. 1995) to support his argument. However, VanLeewen, actually supports the denial of benefits in this case. In VanLeewen, the Court found that the claimant's motor vehicle accident on his way to work did not arise out of and in the course of employment despite driving a company-owned truck. The court held that the going and coming rule has some exceptions, such as where, "the employer **requires** the employee to use a vehicle as an instrumentality of the business." The court stressed, however, that the circumstances did not bring Mr. VanLeewen's motor vehicle accident within the course of employment since: 1) the employer did not require him to perform any job-related service or use the company vehicle as a business instrumentality while traveling to or from work; 2) he was not on any company related "special errand" or "special mission" at the time of the accident; 3) he was not being compensated for his time spent traveling between his home and

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<sup>3</sup> In Barney v. Industrial Comm'n, 506 P.2d 1271 (Utah 1973) the court stated the general rule that – ordinarily, an employee is not within the scope of employment when he furnishes his own transportation and is injured when going to or from his place of employment. Such is the case here.

the employer's office; 4) the accident did not occur on the employer's premises, nor did VanLeeuwen's duties require him to be at the place where the accident occurred; 5) the risk that caused the accident was one common to the traveling public and was not created by duties connected with his employment; and, 6) VanLeewen was not under the control or supervision of the employer at the time of the accident, had chosen his own route each day, and occasionally engaged in personal errands while traveling to and from work.

Mr. Jex also cites Bailey v. Utah State Indus. Comm'n, 398 P.2d 545 (Utah 1965). In Bailey, an employee was involved in a fatal car accident when driving his own vehicle to his work – a service station. However, in Bailey the court held that the personal vehicle was an instrumentality of business since it was used by the employee for emergency calls at all hours; the employee was required to carry necessary tools to service and repair customer's automobiles; the employee permitted customers to use this vehicle when their cars were being serviced; and the employee was reimbursed by the employer for all oil and gas charges for the vehicle. There the court held that it was the employee's regular and definite duty to take the vehicle to work at the

service station in the mornings for its use in that business. The Bailey case can be distinguished from the case at bar.

Mr. Jex further cites to Moser v. Industrial Commission, 440 P.2d 23 (Utah 1968). In Moser, the court held that a claimant's motor vehicle accident which occurred when pouring gasoline into his truck, was compensable. In Moser, the employer owed the truck but leased it back to the employee. The court held that the status of the truck in that instance was, "the same as if it had belonged to the company" since it was "committed to being used in defendant's business." Additionally the employee in the Moser case was under the direction of the employer to follow specific maintenance guidelines, including reporting of any service work needed.

Mr. Jex also cites to State v. Industrial Comm'n, 685 P.2d 1051 (Utah 1984) to argue that an injury is compensable when transportation is furnished by the employer to benefit the employer. In State, the court evaluated whether a workers' motor vehicle accident was compensable when she was on her way to a job related training program from her usual place of employment. There, the court found the claim compensable under the "special errand" exception since Petitioner's employer benefitted from her training program, she embarked with the

knowledge and at the direction of the employer and such travel was directly related to her job function. See id. at 1054-55.

The facts of the present case support the ALJ and the Commission's finding that Mr. Jex's accident does not fall within an exception to the going and coming rule based upon the use of Mr. Jex's vehicle as the instrumentality of the employer's business. Here, the vehicle driven by the Mr. Jex was **his own**. Although Mr. Jex used his vehicle on two occasions for business purposes<sup>4</sup>, the motor vehicle driven by Mr. Jex was **not** committed to being used in the employer's business, nor was the vehicle being used for any employer purpose **at the time of the accident**. Unlike the court in Moser, Mr. Jex had not been given any general maintenance guidelines for use or operation of the vehicle, and he was not required to report any service work needed on his car to his employer. Moreover, unlike the court in Bailey, Mr. Jex was not required to respond to any emergency service calls for his employer; he did not allow the employer or co-workers to use his vehicle for business

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<sup>4</sup> Mr. Jex presented testimony that on two occasions, he used his personal truck to run errands for his employer on the Cedar City job. Once, Mr. Jex traveled to Napa Auto Parts and later to Wheeler Machinery to get parts needed for the project. He admitted that he was not paid for gas consumption at the time he ran these errands, but that he was on the payroll clock. However, neither of these errands occurred on the date of the accident. (R., 74 at 44-46).

purposes; and Mr. Jex was not reimbursed by the employer for any oil and gas charges for the use of his own vehicle, either while on and errand or when traveling to and from work.

In addition, Mr. Jex was not on any special errand for the employer nor was the employer benefitting from his travel or directing his travel. Moreover, such travel was not directly related to any job function – rather, Mr. Jex was simply traveling home from work as he would on any other occasion at the end of his work shift.

Mr. Jex also argues that because he had tools in his personal vehicle that he would, on occasion, use at the employer's job site, his accident falls within an exception of the going and coming rule. While Mr. Jex admittedly had tools in his vehicle at the time of the accident, the tools did not belong to the employer but rather, were his own personal tools which he used on occasion at work. Moreover, as testified by Trent Holden, and admitted by Mr. Jex, the employer did **not require** that Mr. Jex carry these tools with him to use on any company related project. In fact, the employer had all the necessary tools available at the job site for Mr. Jex's use.<sup>5</sup> Finally, as correctly stated by the

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<sup>5</sup> Mr. Jex argues that the company tools were not readily available for his use and were as far as 2 miles away from his work assignment. Respondents disagree with Mr. Jex's distorted assertion that the tools were located at such a distance from the company truck which contained all the

Commission, Mr. Jex was not using his tools at the time of the accident nor was he using his vehicle to serve any employment purpose or for the benefit of the employer at the time of the accident. He was simply traveling home from work. To adopt Mr. Jex's argument would mean that any time an employee carries a work related item in their vehicle (i.e, a favorite work pen as stated by the ALJ as an example), or a screwdriver, a wrench, or a tape measurer, and is injured in an accident traveling home from work, the accident falls within an exception of the going and coming rule. Certainly, this general rule would be eviscerated if Mr. Jex's suggested application of the going and coming rule were adopted.

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need tools for the job and which remained on the job site at all times. At most, Respondents contend that Mr. Jex may have had to walk a few hundred yards to the company truck for tools, on occasion.

In addition, Mr. Jex argues that the employer expected him to use his truck and tools for business purposes. That is not the case. Mr. Holden did not testify that Mr. Jex's truck or tools were needed for any company purpose. While Mr. Jex did run a total of two errands in his truck to pick up parts, the employer did not mandate that Mr. Jex use his personal vehicle to run these two errands since a company truck was always available for Mr. Jex's use. Moreover, while the employer permitted Mr. Jex to use some of his personal tools on the job site, there was no requirement that he do so, nor was there any substantial benefit to the employer since the employer had the same tools available in the company truck for Mr. Jex to use.

**B. The ALJ and Commission Correctly Held that this Accident Was Not Compensable Simply Because Mr. Jex Had a Co-employee Traveling with him at the time of the Accident.**

Mr. Jex also argues that because he was traveling with a co-employee as a passenger, the accident, “arose out of and in the course of employment”. Mr. Jex specifically argues that the employer required and expected him to help transport employees to and from the job site on this date and on a regular basis and was expected to be available with transportation in his personal vehicle. Respondents disagree with Mr. Jex’s self-serving interpretation of the facts and his application of the law to the facts in this case.

First, Mr. Jex incorrectly states that the employer mandated that he transport co-employees to and from the job site. Mr. Jex’s supervisor, Trent Holden, testified that there was no obligation or employer mandate that Mr. Jex transport co-workers to and from the job site on a regular basis or on the date of this accident. Mr. Jex’s decision to do so was entirely voluntary and was based upon his desire to have company in his commute home, and to ride in a smoke-free vehicle.

Moreover, Mr. Jex does not cite to any authority to support his argument that the transportation of a co-employee unilaterally renders the going and coming rule inapplicable. In fact, the present case is akin



to that of Cross v. Bd. of Rev., 824 P.2d 1202 (Utah Ct. App. 1992) where the Court of Appeals held that a ride sharing arrangement between an employee and his foreman was out of mutual convenience rather than at the direction of the employer and, therefore, denied benefits. The Cross court additionally stated that transportation to a job site is not integral and necessary to employment as a construction worker. While the court stated that the one benefit conferred upon the employer by such travel is the employee's arrival at work, this benefit was insufficient to bring the accident outside of the general going and coming rule. In fact, the court directly stated that the construction business is not deserving of special treatment in going and coming cases.

Other cases also provide support for the Commission's denial of benefits in this case. In Wilson v. Industrial Comm'n, 207 P.2d 1116 (Utah 1949) an employee died while riding as a passenger with a co-employee. In the Wilson case, the court held that the going and coming rule bars benefits. In that case, the court looked to a variety of factors supporting a denial of benefits to include as follows: The claimant was not performing work duties while traveling; the claimant was not at work at the time set when the injury occurred; the employer did not change his hour of departure from work; and the employer did not give the

claimant any instructions on the route of travel, or exercise any control over the employee. These factors apply with equal force to this case and support the ALJ's denial of Mr. Jex's claim for workers' compensation benefits. Mr. Jex's claim for workers' compensation benefits should be dismissed with prejudice.

**C. The Commission Did Not Rely on Any Incompetent Evidence.**

Mr. Jex also argues that the Commission relied upon incompetent hearsay evidence, amounting to a violation of Mr. Jex's right to due process. At the outset, Respondents note that this argument was only mentioned in passing in Petitioner's Motion for Review in a footnote. (R., 47). Moreover, a timely objection was not made by Mr. Jex at the evidentiary hearing. Therefore, there is no error committed by the Commission in its failure to address this argument as Mr. Jex provided no substantive or timely argument on this issue at the administrative hearing.

Aside from these procedural flaws, Mr. Jex specifically argues that the Labor Commission improperly relied on a hearsay statement of James Irvin, introduced through Trent Holden; that Mr. Irvin did not want to leave the worksite but wanted to work longer on the date of

accident. (R., 74 at 96). At hearing, Trent Holden testified that when Mr. Jex went back and asked if he should give James Irving a ride home, Mr. Holden responded that he could ask James Irving if he wants to go and give him a ride or that he could stay and work later. Evidence was also presented through Mr. Holden that Mr. Irving was upset because Mr. Jex never communicated that he could stay and work late. (R., 74 at 95). Mr. Jex argues that this evidence was improperly relied upon by the Commission.

Although these statements made by Mr. Holden are hearsay, Utah law permits the introduction of hearsay evidence in worker's compensation cases. Indeed, it is well settled that hearsay evidence is admissible in an administrative hearing before the Commission; however, the Commission's Findings of Fact cannot be based exclusively on hearsay evidence and there must be a residuum of evidence, legal and competent in a court of law, to support an award. See Hoskings v. Industrial Comm'n, 918 P.2d 150 (Utah Ct. App. 1996).

In this case, there was other competent evidence to support the ALJ and Commission's ruling that the employer did not mandate ride sharing and was not controlling Mr. Jex's actions immediately prior to the accident. Indeed, other non-hearsay evidence, including that

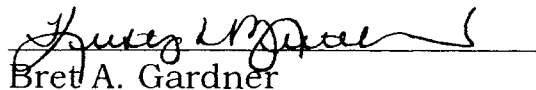
evidence of Mr. Holden was presented at the hearing to show that the employer did not require Mr. Jex to transport any employees to and from work. (R., 74 at 95-97). On this basis, the ALJ and the Commission's order is not based solely upon unsubstantiated hearsay evidence.

### **CONCLUSION**

The Court of Appeals should affirm the Commission's Order Affirming ALJ's Decision. Mr. Jex's accident falls within the general provisions of the going and coming rule. Mr. Jex has not shown that any exception to this rule applies or that the Commission made any legal error which warrants a reversal of the Labor Commission's decision.

Respectfully submitted this 9<sup>th</sup> day of March, 2011.

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### CERTIFICATE OF SERVICE

I certify that true and correct copies of the foregoing document were mailed, first class, postage prepaid on the 9<sup>th</sup> day of March, 2011 and/or Hand Delivered, to:

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